

112 FERC ¶ 61,186
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Sudeen G. Kelly.

Calpine Oneta Power, L.P.

Docket No. EL04-21-000

v.

American Electric Power Service Corp.

ORDER DENYING COMPLAINT

(Issued August 15, 2005)

1. In this order, the Commission addresses a complaint filed by Calpine Oneta Power L.P. (Calpine) against Public Service Company of Oklahoma, an affiliate of American Electric Power Corporation (AEP) (collectively, AEP). Calpine, a generating company, unilaterally requests that the Commission modify its interconnection agreement (IA) with AEP by reclassifying certain facilities as network upgrades, and to consider its request under the just and reasonable standard of the Federal Power Act (FPA).¹ For the reasons described below, the Commission denies Calpine's complaint; the contract modification requested by Calpine is ineligible for consideration under the just and reasonable standard and fails to meet the public interest standard.

Background

2. On November 13, 2003, Calpine filed a complaint against AEP claiming that AEP has unjustly and unreasonably classified certain Calpine interconnection facilities, which Calpine says are located beyond the point of interconnection, as direct assignment facilities rather than network upgrades. Calpine seeks to have these facilities reclassified, and also seeks reimbursement, in the form of transmission credits, for the actual construction of the interconnection facilities (\$5,175,907.88), plus interest. Calpine states that the IA gives Calpine the right to have this complaint considered under the FPA's just and reasonable standard, per the Commission's holding in *Duke Hinds, LLC v. Entergy Services, Inc.*, which held that, where an IA provides for either party to unilaterally request changes to the IA under the FPA sections 205 and 206, the

¹ 16 U.S.C. §§ 791a – 825r (2000).

appropriate standard of review for modifying the contract is the just and reasonable standard.² In support, Calpine refers to section 10.1 of the IA, entitled, Applicable Laws and Regulations, which provides:

This Agreement and all rights, obligations, and performances of the Parties hereunder, are subject to Applicable Laws and Regulations.

Notwithstanding the foregoing, each Party shall have the right at its sole expense to contest the application of any Applicable laws and Regulations to such Party before the appropriate authorities.

3. Notice of Calpine's complaint was published in the *Federal Register*, 68 Fed. Reg. 65,694 (2003), with the answers to the complaint and comments, interventions or protests due on or before December 4, 2003. AEP filed an answer on December 4, 2003 (December 4 Answer).

4. On December 19, 2003, Calpine submitted a motion for leave and answer in response to AEP's December 4 Answer. On December 22, 2003, AEP filed an answer opposing Calpine's answer. Subsequently, on January 5, 2004, AEP filed a response to Calpine's answer.

5. AEP disputes the applicability of FPA section 206's just and reasonable standard, and says that the public interest standard of the *Mobile-Sierra* doctrine applies.³ In support, AEP points to section 13.2 of the IA, entitled, Modification, which provides:

² 102 FERC ¶ 61,068 at P 21 (2003), *reh'g pending (Duke Hinds II)*.

³ We explained the *Mobile-Sierra* doctrine in *Northeast Utilities Services Co.*:

[U]nder the *Mobile-Sierra* doctrine, rate filings consistent with contractual obligations are valid; rate filing inconsistent with contractual obligations are invalid. Parties to a contract . . . cannot waive the indefeasible right of the Commission under section 206 to replace rates that are contrary to the public interest, "as where [the existing rate structure] might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." . . . This standard is in contrast to the normal section 206 standard which allows the Commission to replace rates found to be unjust, unreasonable, unduly discriminatory or preferential.

66 FERC ¶ 61,332 at 62,076-77 (1994), *aff'd, Northeast Utilities Service Co. v. FERC*, 55 F.3d 686 (1st Cir. 1995).

No amendment or modification to this Agreement or waiver of a Party's rights hereunder shall be binding unless it shall be in writing and signed by the Party against which enforcement is sought. This Interconnection Agreement may be amended by and only by a written instrument duly executed by each of the Parties hereto.

AEP argues that, because IA section 13.2 clearly limits the parties' rights to seek unilateral modification of the IA, the Commission must apply the public interest standard to Calpine's unilateral request for IA modification. For Calpine to meet the public interest standard, AEP continues, it must demonstrate that its losses from the IA are so great that they threaten Calpine's ability to continue service, cast an excessive burden on its customers, or are unduly discriminatory to the detriment of other customers. AEP points out that Calpine has not made these demonstrations.

6. AEP states that Calpine misreads section 10.1. Section 10.1, states AEP, is only a standard provision that acknowledges each party's obligation to meet any applicable laws or regulations to which it may be subject, and preserves each party's right to contest the applicability of any such laws or regulations to which it might otherwise be subject. AEP argues that this section allows the contracting parties to contest laws and regulations, but is silent about unilateral modification. AEP points out that Calpine is not contesting the Commission's order accepting the IA, which AEP believes would be proper under section 10.1, but rather is requesting contract modification, which explicitly falls under section 13.2 of the IA.

Discussion

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits answers to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Calpine and AEP's answers to AEP's December 4 Answer and each other's answers, and will, therefore reject them.

8. We note that we have addressed a similar complaint, regarding similar provisions in AEP interconnection agreements, in *Kiowa Power Partners, LLC v. Public Service Company of Oklahoma*.⁴ We found there that section 10.1, even when amplified by the definition in section 1.2 of the IA of "applicable laws and regulations,"⁵ is merely a

⁴ 110 FERC ¶ 61,116 (2005) (*Kiowa*).

⁵ Section 1.2 of the IA defines applicable laws and regulations to mean "all applicable federal, state and local laws, ordinances, rules and regulations, and all duly promulgated orders and other duly authorized actions of any Governmental Authority having jurisdiction over the Parties and/or their respective facilities."

standard clause that acknowledges the parties' obligations to obey the directives of the governmental entities.⁶ Section 10.1 says nothing about unilateral contract modification. We now likewise decline to read this standard clause as negating the language in IA section 13.2 that explicitly requires both parties' agreement to modification of the IA, including the assent of the party against whom enforcement is sought. Calpine's reliance on *Duke Hinds II* is misplaced; the contract at issue in *Duke Hinds II*, unlike Calpine's IA, preserved each party's unilateral right to seek amendments. Despite its reliance on section 10.1, Calpine is not contesting the Commission orders accepting the IA for filing. Therefore, Calpine misconstrues the terms of the IA, and applies the incorrect standard to the unilateral modification request.

9. Having determined that Calpine's complaint is not reviewable under the just and reasonable standard, we will consider it under the public interest standard. Calpine states that the facilities at issue are located beyond the point of interconnection with the transmission grid and seeks transmission credits. However, Calpine makes no showing that its IA has caused it financial distress or that it threatens its ability to continue service, or that the IA casts an excessive burden on its customers, or that it is unduly discriminatory to the detriment of other customers that are not parties to this proceeding. Nor are there any other factors on this record to demonstrate that the contract is contrary to the public interest.⁷ We conclude, therefore, that Calpine has failed to meet the public interest standard and will deny its complaint.

The Commission orders:

(A) The unauthorized answers of Calpine and AEP are hereby rejected.

(B) The complaint filed by Calpine is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁶ *Kiowa* at P 17.

⁷ *See Supra* note 5.